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ALEXANDER L. STEVAS,
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No.

In The

Supreme Court of the United States

October Term, 1982

ALBERTA GAS CHEMICALS, LTD.,
Petitioner,

v.

CELANESE CORPORATION and
CELANESE CHEMICAL COMPANY, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 20, 1982

QUESTIONS PRESENTED

1. Whether a party can bring a private action against a competitor who deliberately presents fraudulent misstatements to a federal administrative agency in the course of a formal investigation by that agency, with the intent, and effect, of substantially damaging that party in the marketplace, and where the federal agency is powerless to award a remedy?

2. Whether a United States District Court has jurisdiction to entertain the action?

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties in the Court of Appeals and District Court.*

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* The stockholders of petitioner Alberta Gas Chemicals, Ltd. (each of which owns 50% of the stock of petitioner), are ALLARCO DEVELOPMENTS LTD. and NOVA, AN ALBERTA CORPORATION. Petitioner partially owns a subsidiary known as Petralgas Chemicals N.Z., Ltd. The following entities are affiliates of petitioner: AGEC Security Corporation; A.G. Industries International, Inc.; A.G. Investments Ltd.; A.G. Pipe Lines Inc.; A.G. Pipe Lines (Canada) Ltd.; The Alberta Gas Ethylene Company Ltd.; Algas Engineering Services Ltd.; Allarco Financial Corporation Ltd.; Allarco Group Ltd.; Allarco Holdings Inc.; Allarco Inc.; Allar-Tic, Inc.; Canstar Oil Sands Ltd.; Can Ocean Resources Ltd.; Cardev Ltd.; Carma Developers, Inc.; Carma Developers Ltd.; Carma Developers (Arizona) Inc.; Carma Developers (California) Inc.; Carma Developers (Colorado), Inc.; Carma Developers (Florida) Inc.; Carma Developers (Oregon), Inc.; Carma Developers (Texas) Inc.; Carma Developers (Washington) Inc.; Carma Investments, Ltd.; Carma Ltd.; Carma Properties, Inc. (Arizona); The Christiana Companies, Inc.; Diamond Shamrock Alberta Gas; Energy Equipment & Systems Inc.; ENESCO Chem Ltd.; Foothills Pipe Lines (Yukon) Ltd.; Grove Valve and Regulator Company; Husky Industries Inc.; Husky Oil Company; Husky Oil Ltd.; Husky Oil Operations Ltd.; Interprovincial Steel and Pipe Corporation Ltd.; Ledeen Flow Control Systems Inc.; Lifecycle, Inc.; Northwest International Bank and Trust Company; North West Trust Company; Novacor Chemicals Ltd.; Novalta Resources Ltd.; Noval Technologies Ltd.; NOVA/Husky Research Corporation Ltd.; Pan-Alberta Gas Ltd.; Petrosec Exploration Inc.; Pipeline Hydraulics Engineering Inc.; Q&M Pipe Lines Ltd.; Seaboard Life Insurance Company; Standard Guarantee Corp.; Steel Alberta Ltd.; Trans Quebec & Maritimes Pipeline Inc.; Travellers Acceptance Corporation, Ltd.; Travellers Acceptance Corporation (California); Uno-Tex Petroleum Corporation; WAGI International S.p.A.; Western Star Trucks Inc.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Alberta Gas Chemicals, Ltd. ("Alberta Gas") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on May 28, 1982.

OPINIONS BELOW

The judgment of the Court of Appeals affirming the dismissal of petitioner's complaint and its order denying rehearing in banc are set forth as Appendices E and F, respectively. As stated in the judgment, the Court of Appeals adopted the two opinions of the District Court for the Southern District of New York. The first opinion of the District Court is reported at 497 F.Supp. 637 (S.D.N.Y. 1980) and appears as Appendix A.

The opinion of the Court of Appeals on the first appeal, reported at 650 F.2d 9 (2d Cir. 1981), appears as Appendix B. The unreported stay of proceedings issued by the District Court following the first appeal is Appendix C. The second opinion of the District Court, reported at 529 F.Supp 226 (S.D.N.Y. 1981), is Appendix D.

JURISDICTION

The judgment of the Court of Appeals was entered on May 28, 1982, and a timely petition for rehearing containing a request that the appeal be reheard in banc was denied on July 14, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This case presents the issue of whether a private action for fraud and unfair competition can be maintained against a company, which is a principal competitor of the plaintiff, on the basis that the competitor intentionally misrepresented facts to the United States International Trade Commission (the "Commission") with the purpose, and effect, of damaging the plaintiff in the marketplace. The Court of Appeals held that no such cause of action can be maintained, and it affirmed the dismissal of Alberta Gas's complaint.[1]

The Parties

Alberta Gas is the largest producer of methanol in Canada and is a substantial seller of methanol in the United States market. Celanese[2] is the largest producer of methanol in the world and is one of the two dominant sellers of methanol in the United States market.

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[1] Because this case was dismissed on the pleadings on the ground that the complaint failed to state a cause of action, the allegations of the complaint (App. G) are taken as true. *See Walker Process Equipment, Inc.* v. *Food Machinery and Chemical Corp.*, 382 U.S. 172 (1965).

[2] Respondents Celanese Corporation and Celanese Chemical Company, Inc. are together herein referred to as "Celanese".

Celanese's Fraudulent Evidence

In June, 1979, the Commission in a "dumping" proceeding determined that sales of methanol from Canada (by Alberta Gas) were likely to injure the United States methanol industry. The Commission's determination was based on fraudulent misrepresentations by Celanese. Celanese deliberately falsified facts, known only to it, as part of an unlawful plan to injure Alberta Gas by (i) delaying or preventing it from constructing additional facilities to produce methanol in Alberta, Canada, and (ii) hindering Alberta Gas in its efforts to sell methanol in the United States.

During the proceedings, the Commission twice asked Celanese whether it might construct methanol producing facilities in the decade of the 1980's. That testimony was of critical importance to the issue before the Commission, *i.e.*, the demand for methanol in the 1980's and the likelihood of future injury to the United States industry because of an additional Canadian facility planned by Alberta Gas. In its response, Celanese failed to disclose its then-contemplated $255 million facility in Alberta, Canada (to be built next to Alberta Gas's headquarters), or its then-contemplated $1 billion facility to be built in the United States — the world's largest methanol producing facility. (Both facilities were intended to produce methanol for the United States market.) To the contrary, Celanese testified that there already existed sufficient methanol producing capacity in the United States to supply the United States demand for methanol during the 1980's. Celanese also testified that that demand would grow at a rate of 6% to 7% per annum. In fact, Celanese believed that the demand for methanol would grow at the rate of at least 10% per annum during the period.

At the conclusion of its proceedings, the Commission found that the United States methanol industry was not presently being injured. However, based upon the false testimony of Celanese, the Commission found a "likelihood of injury" in the future. As a result of that adverse determination, Alberta Gas suffered substantial monetary damages in the marketplace.

Alberta Gas Could Not Have Discovered the Falsity of the Evidence

Because of the nature of Celanese's testimony and the nature of the Commission's proceedings, Alberta Gas was precluded from determining the actual facts with respect to Celanese's plans and beliefs. Those plans and beliefs were within the exclusive knowledge of Celanese and there was no procedural mechanism for Alberta Gas to determine them.

The Commission's investigation of methanol was in the nature of an *in rem* proceeding. No administrative law judge presided. There was no discovery. The Commission's procedures were exempted by statute from numerous provisions of the Administrative Procedure Act, including the bar against *ex parte* evidence set forth in 5 U.S.C. §557(d)(1)(A). In fact, the applicable regulations provided for the submission of *ex parte* written evidence to the Commissioners.[3]

It was not until 90 days after the Commission's decision that Celanese publicly announced its true intentions. Shortly thereafter, it applied to the Alberta Energy Resources Conservation Board for permission to build its $255 million Alberta plant. In the proceedings before that Board, Celanese testified that it believed that, contrary to its testimony before the Commission, the demand for methanol in the 1980's in the United States would far exceed supply.

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[3] When the Commission's investigation was conducted in the spring of 1979, the applicable regulations were contained in 19 C.F.R. Chapter II, Subchapter B. That subchapter was entitled "Nonadjudicative Investigations." 19 C.F.R. §201.6(g), which was made applicable to anti-dumping investigations by 19 C.F.R. §207.5(e), provided that: "Any business information submitted in confidence and determined to be entitled to confidential treatment shall be maintained in confidence by the Commission and not disclosed except as required by law." No statute or regulation provided for the Commission's release of such confidential information to a competitor until 19 U.S.C. §1677f was enacted (effective January 1, 1980, six months after the Commission's methanol determination).

Alberta Gas Has Been Precluded from any Remedy for the Damages Suffered by It

In this action, Alberta Gas seeks damages for (i) the losses sustained in connection with sales of methanol in the United States, (ii) lost sales of methanol in the United States and elsewhere and (iii) the delay in construction of additional methanol facilities in Alberta, Canada. Neither the Commission nor the Court of International Trade (to which the Commission's determination can and was appealed[4]) has jurisdiction to award Alberta Gas any remedy for the damages it suffered as a result of Celanese's fraudulent conduct.

The affirmance by the Second Circuit of the dismissal of the complaint has deprived Alberta Gas of any remedy to recover the damages inflicted on it by Celanese and has permitted Celanese to go unpunished for its fraudulent misconduct. The Second Circuit's decision is contrary to every relevant precedent and is directly contrary to decisions in the Fifth, Ninth and District of Columbia Circuits in cases that are factually indistinguishable. *See, Clipper Exxpress* v. *Rocky Mountain Motor Tariff Bureau, Inc.*, 674 F.2d 1252 (9th Cir. 1982); *Woods Exploration & Producing Co. v. Aluminum Company of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); *Israel* v. *Baxter Laboratories, Inc.*, 466 F.2d 272 (D.C. Cir. 1972).

History of the Litigation

On April 2, 1980, Alberta Gas filed its action against Celanese for fraud and unfair competition in the Southern District of New York. Jurisdiction was based on diversity of

[4] The determination of the Commission was ultimately reversed by the Court of International Trade on grounds unrelated to Celanese's fraudulent misstatements. *Alberta Gas Chemicals, Inc.* v. *United States*, 515 F.Supp. 780 (U.S.C.I.T. 1981). Between the time that the Commission's determination was rendered and the time it was reversed, Alberta Gas suffered millions of dollars of business damages, and it is the attempt to recover those damages which is the basis for Alberta Gas's suit.

citizenship.[5] In October 1980, the District Court dismissed Alberta Gas's complaint for failure to state a claim upon which relief can be granted. In addition, the District Court stated that: "[e]ven if plaintiff's complaint stated a cause of action, this Court's jurisdiction over this dispute seems dubious" and "even if plaintiff stated a cause of action and this Court had jurisdiction over it, the doctrine of primary jurisdiction would constrain us from hearing the case at this time." *Alberta Gas Chemicals, Ltd.* v. *Celanese Corp.*, 497 F.Supp. 637, 640, 641 (S.D.N.Y. 1980) (App. A, pp. A-5, A-6).

Alberta Gas appealed that decision to the United States Court of Appeals for the Second Circuit. On May 12, 1981, a panel of the Second Circuit reversed the District Court and remanded the action with a direction that it be stayed pending an application by Alberta Gas to the Commission requesting it to determine whether Celanese had misrepresented facts to the Commission and, if so, whether those misrepresentations had resulted in the Commission's determination adverse to Alberta Gas. 650 F.2d 9 (2d Cir. 1981) (App. B). Alberta Gas promptly made the application. On August 26, 1981, the Commission denied Alberta Gas's application on the ground that the Commission had no procedure to hear such matters. (The Commission also noted that its determination had been reversed by the Court of International Trade and, therefore, that the Canadian methanol matter was moot with respect to the Commission.) (App. H).

On September 10, 1981, Alberta Gas submitted the decision of the Commission to the District Court and requested that the action proceed. The District Court again dismissed the complaint "for the reasons stated in the opinion reported at 497 F.Supp. 637" (529 F.Supp. at 227) (App. D, p. D-2), and Alberta Gas again appealed to the Second Circuit. That Court affirmed the District Court's decision for the reasons set forth in the District Court's two opinions. (App. E). A petition for rehearing in banc was denied. (App. F).

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[5] Petitioner is a Canadian corporation with its principal place of business in the province of Alberta. Respondents are American corporations with their principal places of business in the United States.

REASONS FOR GRANTING THE WRIT

The decision below, if left standing, will substantially damage the integrity of federal administrative agencies. The refusal to grant Alberta Gas a private remedy will encourage persons appearing before administrative agencies to submit false or fraudulent information because the rewards for doing so will be great and the risks will be minimal.

In sharp contrast to the decision below, the Ninth Circuit recently held in *Clipper Exxpress* v. *Rocky Mountain Motor Tariff Bureau, Inc.*, 674 F.2d 1252 (1982), that no immunity from a damage action should be available to a person misrepresenting facts to a federal administrative agency. It correctly stated (what this Court has previously recognized) that "[a]djudicatory procedures will not always ferret out misrepresentations." *Id.* at 1272; *see, California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 512 (1972). The Ninth Circuit correctly recognized that "[a]dministrative bodies . . . rely on the information presented by the parties before them. They seldom, if ever, have the time or resources to conduct independent investigation. The recognition . . . of a private right of action based on the fraudulent misrepresentation, might be sufficient incentive to induce parties not to fraudulently misrepresent facts." 674 F.2d at 1272 (footnote omitted).

Except for the decision below, each Court of Appeals which has focused on the issue has held that a party can maintain a private cause of action for damages suffered by it as a result of misrepresentations made to an administrative agency by another party. The decision below denies an injured party any remedy to recover damages intentionally and successfully inflicted upon it and encourages competitors in an industry to misstate facts to federal administrative agencies. That decision is irrational on its face and is directly contrary to the law established by the Fifth, Ninth and District of Columbia Circuits. This Court should reverse the judgment below in order to establish a rule of law in the Second Circuit that protects the integrity of federal administrative agencies and makes the law of the various Circuits uniform.

I

THE SECOND CIRCUIT'S HOLDING THAT ALBERTA GAS HAS FAILED TO STATE A CAUSE OF ACTION IS INCORRECT AND IS IN DIRECT CONFLICT WITH DECISIONS OF THE FIFTH, NINTH AND DISTRICT OF COLUMBIA CIRCUITS

The precise rationale of the Second Circuit's holding is not clear. By adopting the opinions of the District Court, the Second Circuit appears to have held that the Alberta Gas complaint was a collateral attack on a determination of the Commission and, therefore, the question of whether Alberta Gas has stated a cause of action is a question of federal law because "[t]he scope and effect of a federal decree is governed by federal law."[6] 497 F.Supp. at 640 (App. A, p. A-5). Alternatively, the Second Circuit may have held that even if Alberta Gas stated a cause of action for fraud and unfair competition under state law, "then it could not be followed in the federal courts...." (App. A, p. A-5). Regardless of which description of the holding is more precise, the decision below is demonstrably incorrect.

It has long been established that a cause of action exists to recover damages suffered by a plaintiff where the defendant misrepresented facts to a federal administrative official. *Al Raschid* v. *News Syndicate Co.*, 265 N.Y. 1 (1934) (relying on *Ratcliffe* v. *Evans*, [1892] 2 Q.B. 524). In *Israel* v. *Baxter Laboratories, Inc.*, 466 F.2d 272 (D.C. Cir. 1972), the defendants were alleged to have suppressed and misrepresented information relating to a drug manufactured by the plaintiffs which was being considered by the Federal Food and Drug Administration. The plaintiffs sought damages and injunctive relief based on an alleged conspiracy under state and federal

[6] In fact, at the time of the second decision of the district court dismissing the complaint, the Commission's determination had been reversed by the Court of International Trade on grounds unrelated to Celanese's fraud. Clearly, Alberta Gas was not collaterally attacking a determination which had already been vacated.

antitrust laws. The District of Columbia Circuit held that the plaintiffs stated a cause of action:

> "The basic concern of the courts of appeal (and one District Judge) in both *Woods* and *Trucking Unlimited* may be deemed the integrity of the regulatory process. No actions which impair the fair and impartial functioning of an administrative agency should be able to hide behind the cloak of an antitrust exemption." 466 F.2d at 278 (footnotes omitted).[7]

The long-standing concern for protecting the integrity of administrative agencies was reiterated in the recent decision of the Ninth Circuit in *Clipper Exxpress, supra,* in which a regulated freight forwarder subject to the jurisdiction of the Interstate Commerce Commission sued other trucking companies and a trucking rate bureau. The basis for the suit was misrepresentations made by the defendants to the ICC in connection with an application by the plaintiff to reduce its freight rates. The plaintiff was ultimately successful before the ICC, but, because of delay resulting from the defendants' misrepresentations, the plaintiff alleged that it suffered damages in the marketplace. The Ninth Circuit held that a valid claim was stated:

> "We hold that the fraudulent furnishing of false information to an agency in connection with an adjudicatory proceeding can be the basis for antitrust liability, if the requisite predatory intent is present and the other elements of an antitrust claim are proven." 674 F.2d at 1271.

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[7] The court rejected the use of the *Noerr-Pennington* defense (*Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965)), because that defense applies only to the " 'right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws.'... Where these political considerations are absent the *Noerr* doctrine is inapplicable. . . ." 466 F.2d at 277 (quoting from *Woods Exploration and Producing Co.* v. *Aluminum Company of America*, 438 F.2d 1286, 1296 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972)).

In response to the defendants' argument that they enjoyed first amendment protection in submitting evidence to the ICC, the court stated:

> "As the Supreme Court stated in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789 (1974); 'there is no constitutional value in false statements of fact.' Contrary to defendants' assertions, there is simply no basis to hold that deliberately misrepresenting facts to an administrative body for anticompetitive purposes enjoys blanket first amendment protection." *Id.* at 1271.
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> * * *
>
> "Clipper claims defendants knew the falsity of their statements, and made those statements in a deliberate attempt to mislead a regulatory body. We can conceive of no stricter standard than that satisfied by the facts alleged by Clipper." *Id.* at 1272.

The Ninth Circuit in *Clipper Exxpress* observed that the supplying of fraudulent information to agencies exercising adjudicatory functions threatens their fair and impartial functioning:

> "As the Supreme Court noted in *Trucking Unlimited,* the adjudicatory sphere is much different from the political sphere. . . . In the adjudicatory sphere . . . information supplied by the parties is relied on as accurate for decision making and dispute resolving. The supplying of fraudulent information thus threatens the fair and impartial functioning of these agencies and does not deserve immunity from the antitrust laws. *See, e.g., Israel* v. *Baxter Laboratories, Inc.*, 466 F.2d 272, 275-80 (D.C. Cir. 1972)." *Id.* at 1271.[8]

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[8] In *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508, 512 (1972), this Court stated that perjury of witnesses in the adjudicatory process would be "unethical conduct" which would not be immune from the application of the antitrust laws.

The Ninth Circuit stated that the existence of a private right of action is an important deterrent to persons who would otherwise fraudulently testify before administrative agencies:

> "Adjudicatory procedures will not always ferret out misrepresentations. Administrative bodies and courts, however, rely on the information presented by the parties before them. They seldom, if ever, have the time or resources to conduct independent investigations. *The recognition, however, of a private right of action based on the fraudulent misrepresentation, might be sufficient incentive to induce parties not to fraudulently misrepresent facts." Id.* at 1272 (emphasis added; footnote omitted).

The relevant facts of *Clipper Exxpress* cannot be distinguished from those in the instant action. Alberta Gas has alleged a cause of action for unfair competition against one of its principal competitors in the United States methanol industry. The basis for the action is the evidence of Celanese before the International Trade Commission which it intentionally falsified to give it a competitive advantage in the marketplace. In both cases, the plaintiff was ultimately successful before the agency (or on appeal) but both suffered damages as a result of the defendants' fraud during the period prior to its success.

In its opinion in *Clipper Exxpress,* the Ninth Circuit relied on the Fifth Circuit's decision in *Woods Exploration & Producing Co.* v. *Aluminum Company of America,* 438 F.2d 1286 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972), which, like *Clipper Exxpress,* was the same as the instant action. In *Woods,* the plaintiff alleged that the defendants conspired to prevent the plaintiff from competing in the production of natural gas by filing false production forecasts with the Texas Railroad Commission. The production forecasts were filed by various Texas gas producers and formed the basis on which the Railroad Commission allocated production quotas. The plaintiff alleged that the submission of false forecasts caused a reduction in the amount of gas which the plaintiff was allowed to produce.

The Fifth Circuit held that the plaintiff stated a cause of action under state and federal antitrust laws based on the false

testimony presented to the Texas Railroad Commission. Again, the court was concerned with protecting the integrity of an administrative agency:

> ". . . [I]n the case at hand there is an allegation that the Commission's production allowable order rested upon false facts adduced by defendants. There was, moreover, no opportunity for meaningful supervision or verification. Because of the amount and character of nomination predictions, the Railroad Commission of necessity must rely on the truthfulness of the gas producers. Such facts are usually in the exclusive control of those producers, so the final order of the Commission often must accept the nomination at face value." 438 F.2d at 1295.

The facts of the instant action bear a striking resemblance to *Woods*. The false and misleading testimony of Celanese related to its undisclosed intentions to build methanol producing facilities and to its estimates for the demand for methanol during the 1980's. These facts were within the "exclusive control" of Celanese and could not be "verified" by the Commission which, like the Railroad Commission in *Woods*, must rely on the truthfulness of industry members in making its determination.

Alberta Gas has, like the plaintiff in *Woods*, alleged that the Commission would not have found a likelihood of future injury to the United States methanol producing industry had Celanese testified truthfully. Alberta Gas has also alleged that it was injured as a result of Celanese's actions. Finally, Alberta Gas has alleged that Celanese committed fraud for anticompetitive purposes. In short, the facts alleged in the Alberta Gas complaint are, in all respects, virtually identical to the facts in *Woods*.

The opinions of the Fifth, Ninth and District of Columbia Circuits in *Woods*, *Clipper Exxpress* and *Israel* are well-reasoned and eminently correct. The decision below, which is not supported by a formal opinion, is clearly incorrect. Under the rule of law adopted by the Second Circuit, Alberta Gas and

companies similarly victimized are denied any remedy for damages intentionally inflicted upon them by companies which fraudulently misrepresent undiscoverable facts to federal administrative agencies. That rule grants practical immunity to companies committing such fraud and consequently encourages the commission of such fraud on administrative agencies. This Court should exercise its jurisdiction to invalidate the rule of law adopted by the Second Circuit and make the law in this critically important area uniform throughout the Circuits.

II

IF THE SECOND CIRCUIT MEANT THAT THE DISTRICT COURT DID NOT HAVE SUBJECT MATTER JURISDICTION, THAT DECISION WAS INCORRECT AND IS IN DIRECT CONFLICT WITH DECISIONS OF OTHER CIRCUITS AND THIS COURT

The first District Court opinion, which was approved by the Second Circuit, stated that "[e]ven if plaintiff's complaint stated a cause of action" the court's jurisdiction over the Alberta Gas complaint "seems dubious" because Congress has "granted to the Customs Court [now the Court of International Trade] 'exclusive jurisdiction' over actions challenging orders or findings made in the administrative process." 497 F.Supp. at 640 (App. A., pp. A-5-6). It is clear, however, that Alberta Gas is not challenging the determination of the Commission (which has been reversed) and that Congress never granted the Court of International Trade the authority to entertain a private damage action for fraud.

The jurisdiction of the Court of International Trade was limited solely to a determination of whether the Commission's injury determination was supported by substantial evidence on the record. *Alberta Gas Chemicals, Inc.* v. *United States,* 515 F.Supp. 780, 789 (U.S.C.I.T. 1981). The truth or falsity of the evidence (much of which was nonpublic) was not within the scope of that review. (Nor has the Court of International Trade any jurisdiction, under any circumstances, to award damages to a person injured by false testimony.)

In *Clipper Exxpress,* the proponent of a new tariff had ultimately prevailed before the ICC in the face of the defendants' fraudulent protests. The Ninth Circuit recognized that the ICC had exclusive authority to set rates, but there was no applicable ICC remedy to recover the damages caused by the defendants' protests. It differentiated the plaintiff's action from a challenge to the legality of a rate approved by the ICC and upheld the jurisdiction of the District Court.

In *Israel* v. *Baxter Laboratories, Inc., supra,* the plaintiffs alleged that the defendants had improperly influenced the Food and Drug Administration to deny fair consideration to the plaintiffs' drug application. The Court of Appeals for the District of Columbia, in remanding the action to the District Court, carefully distinguished between the plaintiffs' right to a review based on the substantial evidence standard and the plaintiffs' right to an independent action based on the alleged impropriety, and it preserved both rights. In the present case, Alberta Gas's right to a review based on a lack of substantial evidence has been successfully exercised, but its right to recover for damages caused by Celanese's fraud has been taken away as a result of the Second Circuit's confusion of the two rights.

This Court has long recognized that distinction. *American Well Works Co.* v. *Layne & Bowler Co.,* 241 U.S. 257 (1916), involved a claim of unfair competition based upon allegedly false charges of patent infringement. This Court (Holmes, J.) held that jurisdiction in the state court was proper and stated:

> "A suit for damages to business caused by a threat to sue under the patent law is not itself a suit under the patent law. And the same is true when the damage is caused by a statement of fact,—that the defendant has a patent which is infringed. What makes the defendants' act a wrong is its manifest tendency to injure the plaintiff's business; and the wrong is the same whatever the means by which it is accomplished. But whether it is a wrong or not depends upon the law of the state where the act is done, not upon the patent law, and therefore the suit arises under the law of the state. A suit arises under the law that creates a cause

of action. The fact that the justification may involve the validity and infringement of a patent is no more material to the question under what law the suit is brought than it would be in an action of contract." *Id.* at 259-60.

Similarly, the suit by Alberta Gas is not a suit "arising under" the customs laws (it is a suit for fraud and unfair competition), and the District Court clearly has diversity jurisdiction to hear the claim. Access to the District Courts should be given to Alberta Gas (and companies similarly situated) in order to provide such companies with a remedy for damages intentionally inflicted upon them through fraudulent testimony presented to federal administrative agencies and to deter companies from committing such fraud upon those agencies.

CONCLUSION

For the foregoing reasons, petitioner repectfully prays that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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